

5-15-1988

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### Recommended Citation

Kevin M. Fillo *Intramilitary Tort Immunity: A Constitutional Justification*, 15 Pepp. L. Rev. 4 (1988)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol15/iss4/4>

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# Intramilitary Tort Immunity: A Constitutional Justification

## I. INTRODUCTION

Intramilitary tort immunity has been the subject of considerable criticism by commentators<sup>1</sup> and has been questioned by several

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1. See, e.g., Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U.L.J. 383 (1985) (arguing against the mechanistic application of *Feres v. United States* and asserting that disciplinary considerations underlying the doctrine compel reversal); Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93 (1985) (advocating direct involvement of civilian courts in intramilitary tort actions, justified by the lack of adequate administrative remedies as well as a need to provide civilian values); Steinman, *Backing off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269 (1984) (discussing military tort claims brought directly under the context of the first amendment, arguing that "raising of the barriers to recovery under the Constitution was not convincingly supported, and enhanced the risk that the constitutional rights of some people, in some circumstances, [i.e. military personnel] will be so unenforceable as to violate constitutional minima." *Id.* at 269-70); Comment, *Constitutional Tort Remedies: A Proposed Amendment To The Federal Tort Claims Act*, 12 CONN. L. REV. 492 (1980) (criticizing the "incident to service" test as outmoded, and resting upon a legal fiction; advocates amending the Federal Tort Claims Act (FTCA) to allow servicemen to allege violations of a constitutionally protected interest to sue arising under the Constitution of the United States, thereby extending FTCA coverage to all torts) [hereinafter Comment, *A Proposed Amendment*]; Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979) (asserting that the *Feres* exemption to the FTCA is unnecessary since the role of the *Feres* doctrine is adequately fulfilled by the "discretionary function" exception of the FTCA, which excludes government liability for claims stemming from "discretionary" activity by the government or its employees) [hereinafter Note, *From Feres to Stencel*]; Comment, *The Feres Doctrine: Has It Created Remediless Wrongs For Relatives of Servicemen?*, 44 U. PITT. L. REV. 929, 952-53 (1983) (advocating a narrower definition of the phrase, "incident to service," entailing case-by-case analysis of whether policies underlying the *Feres* doctrine would be served by denying claimant a cause of action) [hereinafter Comment, *The Feres Doctrine*]; Note, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992 (1986) (asserting that military remedies do not adequately deter or compensate victims of military misconduct; advocates general rule allowing intentional or constitutional tort claims by former servicemen) [hereinafter Note, *Intramilitary Tort Law*]. But see Fillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. REV. 489 (1982) (proposing that most intramilitary disputes be removed from the courts and that Congress authorize a form of administrative relief for uncompensated servicemen); Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. REV. 177 (1984) (presenting comprehensive analysis of military rights and relationships under Constitution, concludes that civil courts are justified in treating military as a separate community).

courts.<sup>2</sup> Denial of civil relief to servicemembers injured in the course of military duty has generally been justified by the lack of a legislative waiver of the protection afforded the federal government under the doctrine of sovereign immunity.<sup>3</sup> Litigants have unsuccessfully attempted to overcome this hurdle by bringing intramilitary tort claims under both the Federal Tort Claims Act (FTCA)<sup>4</sup> and directly under the Constitution<sup>5</sup> under the theory of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>6</sup>

During the 1987 term, the Supreme Court reviewed *United States v. Stanley*,<sup>7</sup> in which the Eleventh Circuit Court of Appeals had allowed an injured serviceman to bring a cause of action under both the FTCA and a constitutional tort theory.<sup>8</sup> In *Stanley*, the Supreme Court reiterated its commitment to the doctrine established in *Feres v. United States*<sup>9</sup> and established a per se rule that no cause of action exists under *Bivens* to members of the Armed Forces for injury incident to service.<sup>10</sup>

This Comment will attempt to reconcile the rationale supporting the *Feres* doctrine, which bars recovery under the FTCA, with the Supreme Court's denial in *Chappell v. Wallace*<sup>11</sup> of a right of action under a constitutional tort theory, and also with the Court's more recent decision in *Stanley*. This inquiry will take a step beyond the question of whether the federal government has consented to be sued

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2. See, e.g., *Stanley v. United States*, 786 F.2d 1490 (11th Cir. 1986) (army veteran allegedly injured by unknowingly ingesting lysergic acid diethylamide (LSD) while participating as volunteer in program purportedly organized to test chemical warfare equipment), *vacated in part, rev'd in part*, 107 S. Ct. 3054 (1987); *Stanley v. Central Intelligence Agency*, 639 F.2d 1146 (5th Cir. 1981) (army veteran brought suit alleging injury caused by Army's negligent administration of LSD to human subjects including plaintiff), *cert. denied*, 107 S. Ct. 3262 (1987); *Hampton v. United States*, 575 F. Supp. 1180 (W.D. Ark. 1983) (former serviceman brought suit alleging injury sustained as result of exposure to radiation during atmospheric testing of nuclear weapons).

3. See generally Comment, *The Feres Doctrine*, *supra* note 1.

4. 28 U.S.C.A. §§ 1346, 2671-80 (West 1976 & Supp. 1987); see, e.g., *United States v. Shearer*, 105 S. Ct. 3039 (1985); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); *Feres v. United States*, 340 U.S. 135 (1950).

5. See, e.g., *Chappell v. Wallace*, 462 U.S. 296 (1983); *Stanley v. United States*, 786 F.2d 1490 (11th Cir. 1986), *vacated in part, rev'd in part*, 107 S. Ct. 3054 (1987); *Jaffee v. United States*, 663 F.2d 1226 (3rd Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

6. In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), the Supreme Court recognized that damages may be obtained for injuries sustained as a consequence of violation of a citizen's fourth amendment rights by a federal official.

7. 107 S. Ct. 3054 (1987).

8. See *Stanley v. United States*, 786 F.2d 1490, 1499 (11th Cir. 1986), *vacated in part, rev'd in part*, 107 S. Ct. 3054 (1987).

9. 340 U.S. 135 (1950); see *infra* text accompanying notes 21-32.

10. Justice Scalia, speaking for the majority, made the Court's position on the issue clear: "We hold that no *Bivens* remedy is available for injuries that 'arise out of or in the course of activity incident to service.'" *Stanley*, 107 S. Ct. at 3063.

11. 462 U.S. 296 (1983); see *infra* notes 47-54 and accompanying text.

by such claimants, and will consider whether an intramilitary tort claim presents a justiciable controversy. This Comment will also consider the policies underlying intramilitary tort immunity and examine the existing congressionally created disciplinary<sup>12</sup> and compensatory<sup>13</sup> remedies designed to deter tortious conduct and compensate injured servicemembers. It will then contrast them to the policies and remedies of civil tort law. Finally, this Comment will conclude with the recommendation that in as much as the Constitution expressly assigns to Congress the responsibility for "the Government and Regulation of the land and naval Forces,"<sup>14</sup> the judiciary should continue to refrain from interfering in intramilitary relationships, and defer to the legislative branch to monitor the effectiveness of the existing scheme of compensation and deterrence.

## II. THE *FERES* DOCTRINE

Prior to 1946, the United States government was immune from all law suits under the doctrine of sovereign immunity.<sup>15</sup> However, this immunity could be waived, as where the government consented to be sued.<sup>16</sup> In the absence of consent, "[r]elief was often sought and sometimes granted through private bills in Congress."<sup>17</sup> However,

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12. See *infra* note 96.

13. See *infra* note 97.

14. U.S. CONST. art. I, § 8, cl. 14.

15. *United States v. McLemore*, 45 U.S. (1 How.) 286, 288 (1846). The concept of sovereign immunity evolved from the common law doctrine that the king could do no wrong. Note, *From Feres to Stencel*, *supra* note 1, at 1099 n.4.

Professor Ogden has described the doctrine as follows:

Under the sovereign immunity doctrine, governments are immune from law suits that are based on their sovereign conduct unless the government consents to suit. This doctrine, imported from monarchical England, was adopted by colonial American common law and remained undisturbed by the American Revolution. Although the United States Constitution does not address sovereign immunity, the Supreme Court embraced the doctrine at an early date. Indeed, the federal government's immunity to suit unfortunately remains an important feature of the common law today. Not until it passed the Federal Tort Claims Act in 1946 did the federal government consent to . . . liability for torts that arise from sovereign acts or omissions by the government or its agencies. The FTCA, however, contains numerous exceptions that significantly undermine its general waiver of immunity.

Ogden, *Entity Liability Under the Federal Tort Claims Act: An Analysis and a Proposal for Changes in the Law*, 15 U.C.D. L. REV. 907, 908-09 (1982). See also Pound, *The Tort Claim Act: Reason or History?*, 30 NAT'L ASSOC. CLAIMANT'S COMPENSATION L.J. 404, 406-09 (1964) (providing excellent historical discussion of doctrine of sovereign immunity).

16. "[T]he government is not liable to be sued, except with its own consent, given by law." *McLemore*, 45 U.S. (1 How.) at 288.

17. *Feres v. United States*, 340 U.S. 135, 140 (1950).

since the congressional machinery<sup>18</sup> proved inadequate to handle such claims, Congress was prompted to enact the Federal Tort Claims Act in 1946.<sup>19</sup> The FTCA waives immunity for civil tort claims and transfers the burden of examining such claims to the courts.<sup>20</sup> Four years later, in *Feres v. United States*,<sup>21</sup> the Supreme Court was asked to interpret the FTCA and determine if Congress had intended the Act to waive governmental immunity in suits where a servicemember claimed injury incident to military service.<sup>22</sup> The Court adopted a narrow construction of the FTCA and declined to include such injuries within its scope.<sup>23</sup>

In denying servicemembers a right of action under the FTCA,<sup>24</sup> the *Feres* Court focused upon several factors which suggested that Congress had not intended to waive immunity for service-related claims:

First, the relationship between the Government and members . . . is "distinctly federal in character" [citation omitted]; it would make little sense to have the Government's liability to members of the Armed Services dependent

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18. *Id.*

19. 28 U.S.C.A. § 1346 (West 1976 & Supp. 1987); *id.* §§ 2671-80 (West 1965 & Supp. 1987).

20. Section 2674 of title 28 of the United States Code states in part: "The United States shall be liable . . . [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ." *Id.* § 2674 (West 1965).

21. 340 U.S. 135, 136-38 (1950).

22. *Feres v. United States*, 340 U.S. 135, 138 (1950). Three cases involving "injury incident to military service" were consolidated in the decision. In *Feres*, the executrix of a deceased serviceman sought recovery for the serviceman's death in a barracks fire. The plaintiff alleged that the serviceman's superiors had negligently quartered him in barracks known, or which should have been known, to be unsafe. *Id.* at 137. In *Jefferson v. United States*, one of the cases consolidated with *Feres*, the plaintiff alleged medical malpractice stemming from an operation he received while in the Army during which a towel marked "Medical Department U.S. Army" was left inside his stomach. *Feres*, 340 U.S. at 137. In *United States v. Griggs*, also consolidated with *Feres*, the executrix of a deceased serviceman alleged that the serviceman died while on active duty due to negligent and unskillful medical treatment by Army surgeons. *Feres*, 340 U.S. at 137. All three plaintiffs attempted to state a cause of action under the FTCA. *Id.* at 138.

23. Justice Jackson, writing for the majority, summarized the Court's position as follows:

We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

*Id.* at 146.

24. The *Feres* Court, however, observed that the language of the FTCA includes within its definition of "employee of the government . . . members of the military or naval forces . . . acting within the scope of [their] office or employment . . ." *Id.* at 138 (quoting 28 U.S.C.A. § 2671 (West 1965)). One commentator focused upon this broad definition of government employees as an indication that Congress intended to waive immunity to servicemembers on active duty except in time of war. See, e.g., Comment, *The Feres Doctrine*, *supra* note 1, at 933-34.

upon the fortuity of where the soldier happened to be stationed at the time of injury. Second, the Veterans' Benefits Act<sup>25</sup> establishes, as a substitute for tort liability, a statutory "no fault" compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the government. . . .<sup>26</sup> [Third,] "the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."<sup>27</sup>

The Court concluded that Congress did not intend to create "a new cause of action dependent on local law for service-connected injuries or death due to negligence."<sup>28</sup>

In support of this construction of the FTCA, the Court observed that "[w]ithout exception, the relationship of military personnel to the Government has been governed exclusively by Federal law."<sup>29</sup> Because the *Feres* Court was concerned that its narrow construction of the statute might be erroneous, and due to the lack of materials with which to determine congressional intent, the *Feres* Court impliedly invited Congress to effect a remedy.<sup>30</sup> Congress, however, has remained conspicuously silent over the years since *Feres* regarding this issue.<sup>31</sup> Although Congress has had ample opportunity to amend

25. At the time the *Feres* case was brought, the Veterans' Benefit Act had not yet been enacted, but when *Feres* was decided, the laws relating to veterans' compensation were codified under title 38 of the United States Code. Comment, *The Feres Doctrine*, *supra* note 1, at 936 n.40. See also Note, *From Feres to Stencel*, *supra* note 1, at 1106 n.43.

26. See *infra* text accompanying and following note 122.

27. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977) (citation omitted).

28. *Feres v. United States*, 340 U.S. 135, 146 (1950).

29. *Id.*

30. Justice Jackson observed:

There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.

*Id.* at 138.

31. In the years since the *Feres* decision, there have been several attempts to amend the FTCA to encompass claims of servicemembers injured incident to military service. Proposed amendments have taken various forms tailored to the political climate of the time. Representative of these proposed amendments are H.R. 2659, 96th Cong., 1st Sess. § 4 (1979) and S. 695, 96th Cong., 1st Sess. (1979), which would have altered the FTCA to allow suits against the United States "not only for the common law torts committed by federal employees 'within the scope of their employment' but also for the constitutional wrongs committed either 'within the scope of' or 'under color of office.'" Comment, *A Proposed Amendment*, *supra* note 1, at 531. H.R. 2659 and S. 695 were modifications of prior measures rejected by the 95th Congress: S. 3314, 95th Cong., 2d Sess., 124 CONG. REC. 11,048 (1978), and S. 2117, 95th Cong., 1st Sess., 123

the Act, it has nevertheless allowed the *Feres* doctrine to stand for over thirty years.<sup>32</sup> This protracted legislative silence demonstrates congressional acquiescence with the status quo.

Of the factors analyzed by the *Feres* court, the most significant is the Court's obvious concern for maintaining the independence of the military, and the negative effects which the recognition of intramilitary tort claims would likely have upon the discipline and effectiveness of the armed forces. In the cases following *Feres*, the Court has gradually shifted its emphasis from statutory construction to an inquiry involving the weighing of the availability of an adequate remedy, the possible effects of inconsistent state law, and the constitutional relationship between the legislative and judicial branches of the federal government. Subsequent cases decided by the Supreme Court have expanded the *Feres* doctrine and refined its rationale, but continue to rest primarily upon a strict construction of the text of the FTCA.

In *Stencel Aero Engineering Corp. v. United States*,<sup>33</sup> the Supreme Court reaffirmed its commitment to the *Feres* construction of the FTCA, and expanded the doctrine to encompass third-party indemnity actions.<sup>34</sup> The *Stencel* court applied the three-factor analysis uti-

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CONG. REC. 15,284 (1977); see Comment, *A Proposed Amendment*, *supra* note 1, at 530 n.178. A proposal which would have allowed servicemembers to sue the United States for injuries sustained due to medical malpractice incident to military service, H.R. 3174, 99th Cong., 1st Sess. (1985), was rejected by the 99th Congress. A similar measure is pending before the 100th Congress. See *infra* note 32.

32. A proposal to amend the FTCA, H.R. 1054, 100th Cong., 1st Sess. (1987), is currently before the House of Representatives. H.R. 1054 would "amend chapter 171 of title 28, United States Code to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care . . ." H.R. REP. NO. 279, 100th Cong., 1st Sess. 1 (1987). The Bill would allow claims to be brought for personal injury or death to a member of the Armed Forces occurring while on active duty. H.R. REP. NO. 279, 100th Cong., 1st Sess. 1, 4. However, the injury must arise out of medical or dental care provided to the servicemember in a fixed medical facility operated by the United States or Secretary of a military department. *Id.* The measure further provides for the reduction of any judgment by an amount equal to the present value of any benefits the servicemember may be entitled to receive from the government. H.R. REP. NO. 279, 100th Cong., 1st Sess. 1, 5. A similar measure, H.R. 3174, 99th Cong., 1st Sess. (1985), was introduced in the 99th Congress. See H.R. REP. NO. 288, 99th Cong., 1st Sess. (1985). House Resolution 3174 was passed by the House, but stalled in the Senate Judiciary Committee. The current measure has been approved by the House, and is given a 53% chance of surviving the Senate vote. *Billcast*, George Mason Univ. (1987) (*Billcast* is a service provided by George Mason University and available on WESTLAW).

33. 431 U.S. 666 (1977). In *Stencel*, a National Guard Officer sued defendant *Stencel*, who cross-claimed against the government for indemnity. The Court held that a third party indemnity action was barred for essentially the same reasons that a direct claim by the serviceman is barred by *Feres*. *Id.* at 674-75.

34. Chief Justice Burger, writing for the majority, opined:

The factors considered by the *Feres* court are largely applicable in this type of case as well; hence, the right of a third party to recover in an indemnity action against the United States . . . must be held limited by the rationale of *Feres* where the injured party is a serviceman.

lized in *Feres* and denied the plaintiff's claim for indemnity in a products liability action.<sup>35</sup>

More recently, however, in *United States v. Shearer*,<sup>36</sup> Chief Justice Burger's opinion revealed a shift in the focus of the Court's analysis. The opinion states:

[I]n the last analysis, *Feres* seems best explained by the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty."<sup>37</sup>

The opinion's emphasis on the need for determining whether a servicemember's suit requires "the civilian court to second-guess military decisions, and whether the suit might impair essential military decisions"<sup>38</sup> raised the prudential concern of maintaining judicial respect for the role of the military and the unique requirements of military discipline. The Supreme Court's analysis of intramilitary tort

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*Id.* at 674.

35. In its analysis of third-party indemnity claims, the *Stencel* court concluded that the relationship between the government and its suppliers is no "less distinctively federal in character" than the relationship contemplated in *Feres* (between the government and its soldiers). *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672 (1977). The Court also justified the inference that Congress had not intended liability to hinge on the vagaries of state law. *Id.* The Court relied on the military compensation scheme of the Veterans' Benefits Act as an upper limit of governmental liability for service-connected injuries. *Id.* at 673. Finally, the *Stencel* Court observed that a trial of a third-party indemnity claim would involve the second-guessing of military orders, with an effect upon military discipline identical to that contemplated by a direct action filed by a servicemember: Members of the armed forces would have to testify as to the propriety of each others' decisions and orders. *Id.* Justice Marshall's dissent attacked the majority's conclusions as to each of the three factors utilized under the *Feres* analysis. He argued that the "distinctively federal" relationship between the government and the military is no less "unique and nationwide" than that of the government and other agencies. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 674-75 (1976) (Marshall, J., dissenting). Justice Marshall further observed that nothing in the Veterans' Benefits Act suggests it was intended to place the burden of fully compensating injured servicemen upon third-parties where the government is at fault. *Id.* at 675. Finally, Marshall argued that disciplinary considerations are not factors to be considered where "a nonmilitary third party brings suit." *Id.* at 676 (Marshall, J., dissenting).

36. 473 U.S. 52 (1985). In *Shearer*, the plaintiff was the mother of an Army Private who had been murdered by a fellow serviceman. *Id.* at 53. Private Shearer was kidnapped and murdered by another Army Private who was eventually convicted and sentenced to a term of 5 to 55 years' imprisonment. *Id.* Mrs. Shearer asserted that her son's murderer had been previously convicted of manslaughter by a German court in 1977 and imprisoned there for 4 years. *Id.* at 54. Mrs. Shearer alleged that her son's murder resulted from the Army's failure to adequately supervise and control the perpetrator, whom they knew to be dangerous. *Id.*

37. *Id.* at 57 (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)).

38. *Id.*



immunity in *Shearer* expanded the inquiry beyond what had previously been strictly a task of statutory construction, to include an assessment of the constitutional relationship between the judicial branch of the federal government and the military establishment.<sup>39</sup>

### III. CONSTITUTIONAL TORT CLAIMS

The recognition of constitutional tort claims in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*<sup>40</sup> served as the catalyst for a re-examination of intramilitary tort immunity. In an effort to avoid the narrow construction of the FTCA mandated by *Feres* and its progeny, litigants have attempted to state a cause of action directly under the United States Constitution<sup>41</sup> using a *Bivens* theory.<sup>42</sup> As a general rule, the courts have denied relief in these cases by referring to the rationale stated in *Feres*, with increasing emphasis upon the presence or absence of a "peculiar and special relationship of the soldier to his superiors . . . ."<sup>43</sup> Without the FTCA's express bar of sovereign immunity to rely upon, these courts have been forced to consider the merits of intramilitary tort claims directly, and to provide an independent rationale for denying servicemembers this right of action.

The Court of Appeals for the Third Circuit dealt with a military *Bivens* claim in *Jaffee v. United States*.<sup>44</sup> In denying the plaintiff

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39. See *infra* notes 51-58 and accompanying text.

40. 403 U.S. 388 (1971).

41. See *supra* note 5 and accompanying text.

42. See *supra* note 6. The awarding of monetary damages for constitutional violations recognized in *Bivens* has been criticized as an infringement on the legislative function and policy vested in Congress by the Constitution. See *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting). The political question analysis, discussed *infra* at notes 64-68 and accompanying text, could well be applied to *Bivens* claims in general. However, the Supreme Court is apparently willing to accept this infringement of Congressional authority. Professor Steinman observes: "[I]t now seems to be settled that the federal courts do have power to award money damages against federal officials in order to vindicate constitutional rights whether or not Congress has expressly authorized such suits." Steinman, *supra* note 1, at 278.

Professor Steinman further comments that: "The courts' power to [entertain *Bivens* claims] . . . springs from the grant of jurisdiction to the federal courts to decide all cases 'aris[ing] under the Constitution, laws, or treaties of the United States.'" *Id.* This view overlooks the fact that the Constitution makes explicit grants of plenary authority to each branch of government. For a detailed discussion of *Bivens* and its progeny, see generally Whitman, *Government Responsibility For Constitutional Torts*, 85 MICH. L. REV. 225 (1986); Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597 (1982).

43. *Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963)); *Jaffee v. United States*, 663 F.2d 1226, 1232 (3rd Cir. 1971), *cert. denied*, 456 U.S. 972 (1982) (quoting *United States v. Brown*, 345 U.S. 110, 112 (1954)).

44. 663 F.2d 1226 (1981) (former soldier who was compelled to participate in an atmospheric atomic weapons test in which he was directly exposed to radiation without

constitutional tort recovery, the *Jaffee* court referred to "the hard policy choices already made by the Supreme Court in a series of related but different cases . . . ."<sup>45</sup> The *Jaffee* court expanded upon the prudential aspects of the *Shearer* Court's application of the *Feres* doctrine:

Suits for service injuries would also appear to have a related effect on the decisionmaking [sic] of military authorities who give orders. Military decisionmakers might not be willing to act as quickly and forcefully as is necessary, especially during battlefield conditions, if they know they will subsequently be called into a civilian court for their actions.<sup>46</sup>

The Supreme Court was confronted with the validity of intramilitary constitutional tort claims in *Chappell v. Wallace*.<sup>47</sup> Chief Justice Burger, speaking for a unanimous Court, stated unequivocally that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations."<sup>48</sup> Several lower courts have read *Chappell* as establishing a per se rule against recovery by servicemembers on a constitutional tort theory.<sup>49</sup> As the *Jaffee* court correctly foresaw, the Supreme Court in *Chappell* employed the *Feres* rationale to justify a narrow construction of the FTCA.<sup>50</sup> However, the Court focused its analysis upon the constitu-

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protection); see also *Veteran's Claims for Disabilities from Nuclear Weapons's Testing: Hearing Before the Senate Comm. on Veterans' Affairs*, 96th Cong., 1st Sess. (1979). See generally Favish, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L. J. 933 (1981); Note, *Intramilitary Tort Law*, *supra* note 1, at 994 n.16.

45. *Jaffee*, 663 F.2d at 1228.

46. *Id.* at 1232.

47. 462 U.S. 296 (1983) (Navy enlistees brought action alleging subjection to racial discrimination by superior officers while stationed aboard ship).

48. *Id.* at 305.

49. See, e.g., *Mollnow v. Carlton*, 716 F.2d 627, 630 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (discharged Air Force officer denied recovery for injury from alleged conspiracy to have him removed from flight duty and ultimately from service); *Gaspard v. United States*, 713 F.2d 1097, 1103 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984) (former Army enlistee denied recovery for injuries allegedly sustained from exposure to radiation during atmospheric atomic weapons testing in 1950's); *Alvarez v. Wilson*, 600 F. Supp. 706, 710 (N.D. Ill. 1985) (naval officer denied recovery for injury allegedly sustained as result of intentional racial discrimination); *Benvenuti v. Department of Defense*, 587 F. Supp. 348, 353 (D.C. 1984) (army physician denied recovery for alleged injury stemming from involuntary dismissal from service); *Hampton v. United States*, 575 F. Supp. 1180, 1184 (W.D. Ark. 1983) (former serviceman denied recovery for alleged injury due to exposure to atmospheric nuclear weapons testing). But see, *Stanley v. United States*, 786 F.2d 1490, 1495 (11th Cir. 1986) (former serviceman stated cause of action for violation of right to privacy for injury allegedly incurred by Army's surreptitious administration of LSD), *vacated in part, rev'd in part*, 107 S. Ct. 3054 (1987).

50. *Chappell*, 462 U.S. at 299. Chief Justice Burger observed: "Although this case concerns the limitations on the type of nonstatutory damages remedy recognized in

tional relationship between the Congress and the military, and emphasized the need for judicial restraint in legitimate Army matters.<sup>51</sup>

The approach of the *Chappell* Court is a decided departure from the *Feres* rationale. Prior to the creation of constitutional tort claims in *Bivens*, the Supreme Court had avoided this difficult question through the expedience of statutory construction. In *Chappell*, however, the Court was forced to confront the sensitive policy considerations of intramilitary civil tort immunity without the FTCA as a backstop.

The *Chappell* Court instead utilized the limitation placed upon constitutional tort recovery set forth in *Bivens*. The *Bivens* Court observed that a remedy was available, since under the facts presented, there were "no special factors counseling hesitation in the absence of affirmative action by Congress."<sup>52</sup> This qualification led to the inference, confirmed in *Chappell*, that in the presence of such "special factors," no *Bivens* remedy would be granted.

In *Chappell*, Chief Justice Burger applied the special factors analysis and found them to be present in the "peculiar and special relationship of the soldier to his superiors."<sup>53</sup> The concerns of the *Chappell* Court were expressed by the Court in the following statement: "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment."<sup>54</sup> Thus, the *Chappell* opinion was really dealing with a question of justiciability, although the decision was veiled by the special factors language of *Bivens*.

Most recently, in *United States v. Stanley*,<sup>55</sup> the Supreme Court reversed the Eleventh Circuit's determination that *Chappell* did not per se bar *Bivens* claims by servicemembers injured in the course of military service.<sup>56</sup> In *Stanley*, the Court rejected the case-by-case special factors analysis suggested by the Eleventh Circuit.<sup>57</sup> Rather, Justice

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*Bivens*, rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* guides our analysis in this case."

51. *Id.* at 301. The *Chappell* court relied upon language in *Bivens* which qualified the recognition of a right of action for damages for the violation of one's constitutional rights. *Id.* at 298. See *infra* note 52 and accompanying text.

52. *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

53. *Chappell*, 462 U.S. at 300 (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

54. *Id.*

55. 107 S. Ct. 3054, 3060-65 (1987); see *supra* note 2.

56. 786 F.2d 1490, 1495 (11th Cir. 1986), *vacated in part, rev'd in part*, 107 S. Ct. 3054 (1987).

57. In *Stanley* the Eleventh Circuit had applied the qualifying language of *Bivens* to justify an exception to the rule established in *Chappell*. The Eleventh Circuit held:

Scalia's opinion observed: "The 'special factor that counsel[']s hesitation' is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate."<sup>58</sup> The Court expressly followed the narrow construction accorded the FTCA in *Feres*, and held "that no *Bivens* remedy is available for injuries that arise out of or . . . in the course of activity incident to service."<sup>59</sup> Like *Chappell*, the *Stanley* opinion is based upon a clearly enunciated concern for the justiciability of intramilitary claims for monetary damages as compensation for violation of a servicemember's constitutional rights.<sup>60</sup>

#### IV. THE CONSTITUTIONAL QUESTION

Interestingly, the Supreme Court has never forthrightly framed the intramilitary tort immunity issue in terms of justiciability, even though other federal courts have done so.<sup>61</sup> The competence of the courts to decide questions relating to the management and utilization of the military has long been a concern of the Supreme Court. As

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"A *Bivens* cause of action may be defeated in a particular case . . . where the defendant demonstrates either that there are 'special factors counseling hesitation in the absence of affirmative action by Congress,' or that Congress has provided an 'equally effective' alternate remedy . . . ." *Id.* at 1494-95. The court distinguished the plaintiff's situation from that of the servicemen in *Chappell*. *Id.* at 1496. The Eleventh Circuit concluded that since the plaintiff in *Stanley* was involved in a voluntary testing program administered by both civilian and military personnel, and since the Veteran's Benefits Act was inadequate to compensate him, he was entitled to a *Bivens* remedy. *Id.* at 1497.

58. *Stanley*, 107 S. Ct. at 3063.

59. *Id.* (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

60. Justice Scalia observed:

Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits. . . . In fact, if anything we might have felt more free to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization . . . for Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, cl. 14, and rely upon inference for our own authority to allow money damages . . . .

*Id.* at 3062 (emphasis in original).

61. See, e.g., *Dumas v. President of the United States*, 554 F. Supp. 10 (D. Conn. 1982). In *Dumas*, the plaintiff alleged that the constitutional rights of his brother, a Private in the United States Army, were violated by the government's failure to obtain his timely release from a Korean prisoner-of-war camp. The court held that the plaintiff's claim raised "legal issues [which] presented non-justiciable political questions which are constitutionally committed to the Executive and Legislative Branches of the Government and thus are not reviewable by the courts." *Id.* at 15; see also Steinman, *supra* note 1, at 291 n.106.

the Court stated in *Gilligan v. Morgan*:<sup>62</sup>

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.<sup>63</sup>

The fundamental justification for the bar to intramilitary civil tort recovery is not the judicially created exception to the FTCA under *Feres*, nor is it the existence of special factors counseling hesitation under *Bivens*; these are simply important *elements* of the threshold constitutional analysis. That fundamental analysis is the aspect of justiciability referred to as the “political question” doctrine.

The classic formulation of the political question doctrine<sup>64</sup> is found in the Supreme Court’s opinion in *Baker v. Carr*.<sup>65</sup> *Baker* is expanded in Justice Powell’s concurring memorandum in *Goldwater v. Carter*,<sup>66</sup> which incorporated the following three inquiries: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of the Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against such judicial intervention?”<sup>67</sup> These three factors form an analytical framework for determining whether intramilitary tort claims present a justiciable issue within the jurisdiction of the civil judiciary, or a nonjusticiable political question delegated exclusively by the Consti-

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62. 413 U.S. 1 (1973); see *infra* notes 88-92 and accompanying text.

63. *Id.* at 10.

64. The so-called political question doctrine is founded upon judicial respect for the authority vested by the Constitution in the legislative and executive branches of the federal government. The courts have determined that it would be inappropriate for them to review actions taken by the coordinate branches, since those branches are subject to periodic review by the electorate. One commentator has described the political question doctrine as follows:

That there are political questions—issues to be resolved and decisions to be made by the political branches of government and not by the courts—is axiomatic in a system of government built on the separation of powers. The federal courts exercise neither the “legislative Powers” nor “the executive Power” of the United States. They do not tax and spend, borrow or coin money, regulate commerce, establish rules of naturalization or exercise any of the other powers vested by the Constitution in Congress; nor make treaties, appoint officers, command the armed forces or make other [such] decisions. . . . The courts exercise the Judicial power of the United States, deciding cases and controversies arising under the Constitution and under the laws and treaties of the United States—laws and treaties made by the political branches.

Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976); see also Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 409 (1984).

65. 369 U.S. 186 (1962) (action brought by Tennessee voters under the civil rights statute, contending that state apportionment statute was unconstitutional).

66. 444 U.S. 996 (1979) (Powell, J., concurring).

67. *Id.* at 998.

tution to the legislative branch.<sup>68</sup>

### A. Textual Commitment

The Constitution allocates military matters between the executive and legislative branches of the federal government. The textual commitment of military affairs to the legislative branch of the government is reflected in article I, section 8 of the Constitution:

The Congress shall have the Power To . . . provide for the common Defense . . . to raise and support Armies . . . To provide and maintain a Navy; To make rules for the Government and Regulation of the land and naval Forces; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States  
 . . . .<sup>69</sup>

The commitment of military affairs to the executive branch appears in article II, section 2, which designates the President as "Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into actual service of the United States."<sup>70</sup>

The Supreme Court has been consistent in its determination that the Constitution contains an explicit grant to Congress of plenary authority over the military.<sup>71</sup> The Court summed up its view of Con-

68. It is important to distinguish a direct claim for damages as compensation for tortious conduct, from appellate review of a military *administrative* action. The Supreme Court's position regarding review of military administrative decisions is as yet unclear. See Note, *supra* note 64 at 390-96. However, several lower federal courts have found the issue to be justiciable. The most prominent example of such review is *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). The *Mindes* court established a widely utilized test which has been followed in eight judicial circuits. See, e.g., *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987); *Sandidge v. Washington*, 813 F.2d 1025 (9th Cir. 1987); *Holdiness v. Stroud*, 808 F.2d 417 (5th Cir. 1987); *Maier v. Orr*, 754 F.2d 973 (Fed. Cir. 1985); *Penagaricano v. Uenza*, 747 F.2d 55 (1st Cir. 1984); *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981); *Williams v. United States*, 541 F. Supp. 1187 (E.D.N.C. 1982); *benShalome v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980); *Cushing v. Tetters*, 478 F. Supp. 960 (D.R.I. 1979).

The *Mindes* test consists of a two-stage inquiry: first, "no review of internal military affairs may take place unless the plaintiff alleges either (a) the deprivation of a constitutional right or (b) violation by the military of a congressional statute or its own regulations." Note, *supra* note 64, at 398-99. The second prong requires a balancing of several subjective and interrelated factors: "(1) The nature and strength of the plaintiff's challenge to the military determination; (2) The potential injury to the plaintiff if review is refused; (3) The type and degree of anticipated interference with the military function; (4) The extent to which the exercise of military expertise or discretion is involved." *Id.* at 399. In contrast to review of military administrative action, the adjudication of military tort claims requires direct judicial intervention, which is forbidden.

69. U.S. CONST. art. I, § 8, cls. 1, 12-14, 16.

70. U.S. CONST. art. II, § 2, cl. 1.

71. Chief Justice Burger, writing for a unanimous court in *Chappell*, opined: "It is clear that the Constitution contemplated that the Legislative Branch have plenary

gress's constitutional authority over the military in *Orloff v. Willoughby*.<sup>72</sup>

[J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be . . . scrupulous not to intervene with legitimate Army matters . . .<sup>73</sup>

In *Chappell*, Chief Justice Burger reasoned that the Constitution contemplated two systems of justice—one for civilians, and one for the military.<sup>74</sup> Under this constitutional mandate, the unanimous Court observed that "Congress has exercised its plenary authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure."<sup>75</sup> In *Stanley*, the majority emphasized the textual commitment: "What is distinctive here is the specificity of that . . . grant of power, and the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches."<sup>76</sup>

The Court's perspective initially appears to preclude judicial review of the military in almost every circumstance.<sup>77</sup> However, the

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control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with this view." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

72. 345 U.S. 83 (1953) (court denied habeas corpus to serviceman-physician who alleged he had been wrongfully inducted into the Army under the Doctor's Draft Act since he had not been assigned to specialized duties nor given a commission as an officer).

73. *Id.* at 93-94.

74. Chief Justice Burger continued: "The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel." *Chappell v. United States*, 462 U.S. 296, 303-04 (1983).

75. *Id.* at 302.

76. *United States v. Stanley*, 107 S. Ct. 3054, 3063 (1987) (footnote omitted).

77. Professor Wechsler observed, regarding the political question doctrine:

[A]ll the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation. Who for example, would contend that the civil courts may properly review a judgment of impeachment when article I section 3 declares that the "sole Power to try" is in the Senate? . . . [T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959). Professor Wechsler's perspective on the textual commitment aspect of the doctrine would apparently preclude all judicial review once a textual commitment is

preclusion properly applies only in the context of *direct* judicial interference with military affairs (like that contemplated in the adjudication of intramilitary tort claims), rather than the review of military administrative action.<sup>78</sup> In fact, the Court has observed that it "has never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."<sup>79</sup> The doctrine of intramilitary immunity proscribes direct judicial interference with "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel"<sup>80</sup> because responsibility for maintenance of this special relationship has been constitutionally delegated to Congress<sup>81</sup>—beyond the jurisdiction of the courts.

### B. Judicial Expertise

The second prong of the political question analysis is born of prudential concerns for the existence of "manageable [judicial] standards."<sup>82</sup> In *Coleman v. Miller*,<sup>83</sup> members of the Kansas Legislature challenged that body's ratification of a proposed amendment to the

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found. Note, *supra* note 64, at 413 n.150. Commenting on Professor Wechsler's statement, Professor Redish remarked: "[T]o be legitimate, a federal court's refusal to adjudicate a dispute between the political branches must be based on a substantive constitutional analysis of the Constitution's allocation of authority." Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 113 (1984). Professor Redish's analysis would certainly extend to the allocation of constitutional authority as between the political branches and the judiciary. More recently, Justice Rehnquist has opined: "[J]udicial deference . . . is at its apogee when legislative action under the constitutional authority to raise and support armies and make rules and regulations for the governance is challenged." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)) (emphasis added).

78. See *supra* note 68.

79. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). In *Stanley*, the Court qualified this statement by suggesting that "it referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages." *United States v. Stanley*, 107 S. Ct. 3054, 3063 (1987).

80. *Chappell*, 462 U.S. at 304.

81. Chief Justice Burger implied that the legislative responsibility in the area of military affairs is exclusive of the judiciary:

Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel that constitutional rights have been violated by a superior officer. Any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in the field.

*Id.*

82. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Coleman v. Miller*, 307 U.S. 433 (1939).

83. 307 U.S. 433 (1939).



United States Constitution.<sup>84</sup> In considering whether the time for ratification had lapsed, the Supreme Court observed that there were no criteria under either the Constitution or any statute upon which to base a judicial determination.<sup>85</sup> The Court reasoned that resolution of the issue would require the "appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice."<sup>86</sup> The Court concluded that the issue was essentially political and therefore nonjusticiable.<sup>87</sup>

In *Gilligan v. Morgan*,<sup>88</sup> a group of Kent State University students sought judicial review of the Ohio National Guard's training patterns. The Court stated that the judiciary lacks the requisite expertise to adjudicate claims involving the training methods used by the military.<sup>89</sup> "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments subject *always* to civilian control of the Legislative and Executive branch."<sup>90</sup> However, in order to clarify its position, the Court added a caveat that its decision was not intended to imply that the conduct of the military is always beyond judicial review.<sup>91</sup>

In *Gilligan*, the Court was asked to review training methods which were alleged to have precipitated the death of several Kent State stu-

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84. The amendment was proposed by Congress in 1924, and was known as the Child Labor Amendment. *Id.* at 435.

85. *Coleman*, 307 U.S. at 453.

86. *Id.* at 453.

87. *Id.* at 454.

88. 413 U.S. 1 (1973).

89. *Id.* at 10-11; see *supra* text accompanying note 61. In *Goldman v. Weinberger*, 475 U.S. 503 (1986) the Supreme Court was faced with a first amendment challenge to military regulation. The petitioner, an orthodox Jew who was an ordained rabbi, was prevented by the Air Force from wearing a yarmulke (skull cap) while in uniform. The petitioner claimed the Air Force regulation violated his first amendment rights to freely exercise his religion. Speaking for the majority, Justice Rehnquist touched upon the issue of manageable judicial standards:

In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the relative importance of the military interest [citation omitted]. Not only are courts 'ill equipped to determine the impact upon discipline that any . . . particular intrusion upon military authority might have,' but military authorities have been charged by the Executive and Legislative branches with carrying out our Nation's military policy.

*Id.* at 508 (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y. L. REV. 181, 187 (1962))). The Court concluded that the Air Force regulation was valid notwithstanding the first amendment. *Id.* at 509-10.

90. *Gilligan*, 413 U.S. at 10 (emphasis in original).

91. *Id.* at 11. It is unclear under what circumstances it would be appropriate for the civil judiciary to directly review military conduct. A case involving military conduct directly violative of direction from the executive or legislative branch might be justiciable. However, the Court has yet to address the question. See *supra* note 68.

dents. The suit involved the use of military force on the civilian community. By contrast, intramilitary tort claims present questions which are wholly divorced from civilian concerns and thus would typically lie entirely beyond the knowledge and expertise of the civil judiciary. The argument in support of the non-justiciability of such claims is therefore especially compelling. Former Chief Justice Earl Warren observed:

[I]t is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.<sup>92</sup>

### C. Prudential Considerations

The most compelling prudential consideration counselling against civil adjudication of intramilitary claims is the nature of the relationship between the judiciary and the other coordinate branches of the federal government.<sup>93</sup> The Supreme Court observed: "The nonjusticiability of a political question is primarily a function of separation of powers."<sup>94</sup> Congress has exercised its constitutional authority under article I, section 8<sup>95</sup> to create a comprehensive system of military justice<sup>96</sup> as well as an extensive "no fault" compensation system<sup>97</sup> to

92. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962).

93. *Baker v. Carr*, 369 U.S. 186, 210-11 (1962).

94. *Id.* at 210. Professor Redish, in a detailed discussion of judicial abstention, focused upon the doctrine's foundation:

The principle of separation of powers between the judicial and legislative branches derives from the fundamental democratic principal of electoral accountability. . . . The essential element of any democratic society is at least some level of majoritarian self determination. . . . It has never been suggested, however, that the judiciary may openly ignore a legislative judgment on any grounds other than constitutionality.

Redish, *supra* note 77, at 76.

95. See *supra* text accompanying note 69.

96. The Uniform Code of Military Justice, 10 U.S.C.A. §§ 801-940 (West 1983), enacted by Congress in 1950, established court-martial jurisdiction over all servicemembers. Appeals from the military courts are heard by the Court of Military Appeals. 10 U.S.C.A. §§ 867, 876 (West 1982). Chief Justice Warren described the Court of Military Appeals as the "civilian" Supreme Court "of the military." See Warren, *supra* note 92, at 188.

97. The Veterans' Benefits Act, 38 U.S.C.A. §§ 301-362 (West 1979 & Supp. 1987), was enacted by Congress in 1958 to provide, among other things, benefits for injured servicemembers. These benefits include free medical care at Veterans Administration medical facilities, and disability pensions. The Supreme Court has described the VBA as serving a dual purpose, "it not only provides a swift, efficient remedy for the injured

compensate those who sustain injury as a result of military service. If the judiciary were to create an alternative remedy in this area, the result would be "plainly inconsistent with Congress' authority in this field."<sup>98</sup>

In both *Feres*<sup>99</sup> and *Chappell*,<sup>100</sup> the Court discussed at length Congress' constitutional authority over the military and its establishment of remedies pursuant to that authority as justification for denying a right of action for injury incident to service. Were the civil judiciary to extend a remedy in addition to those created by Congress, the result would be "multifarious pronouncements by various departments on one question,"<sup>101</sup> the avoidance of which is a major objective of the political question doctrine. This consideration has received special emphasis "in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."<sup>102</sup>

The justiciability test of *Baker v. Carr* and its progeny is disjunctive in application.<sup>103</sup> Nevertheless, with regard to each of the three factors considered, the foregoing analysis leads to the same conclusion: an intramilitary tort claim presents a nonjusticiable political question which the judiciary has no authority to decide.

## V. POLICY CONSIDERATIONS

The traditional policy justifications for intramilitary tort immunity are rooted in the rationales enunciated by the Supreme Court in its unanimous opinion in *Feres*.<sup>104</sup> As the previous analysis suggests, however, the reasoning of the *Feres* court is no longer a sufficient justification for the denial of a civil remedy to injured ser-

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serviceman, but it also clothes the Government in the . . . 'Act's limitations-of-liability provisions.' " *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977).

98. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). The Supreme Court has repeatedly emphasized the primacy of the Legislature in the exercise of its delegated powers. Chief Justice Burger has stated:

Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "it is emphatically the province and duty of the judicial department to say what the law is" . . . it is equally—and emphatically—the exclusive province of Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation.

*TVA v. Hill*, 437 U.S. 153, 194 (1978) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Hence, the judiciary lacks the authority to interfere with an otherwise constitutional exercise of power delegated by the Congress. Redish, *supra* note 77, at 77.

99. See *supra* note 24 and accompanying text.

100. *Chappell*, 462 U.S. at 305.

101. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

102. *Chappell*, 462 U.S. 296, 301 (1983) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981)).

103. *Baker*, 369 U.S. at 217.

104. See *supra* text accompanying note 27.

vicemembers. For instance, subsequent decisions of the Supreme Court abandoned the requirement of parallel private liability.<sup>105</sup> Also, concerns regarding the irrationality of applying the tort law of fifty different jurisdictions to a uniquely federal relationship have failed to inhibit the imposition of tort liability to other federal employees, as well as members of the military who meet the "incident to service" test.<sup>106</sup> Finally, the significance of the alternative compensation available under the Veterans' Benefit Act has been questioned in cases where a family member who may not be independently eligible for benefits sustains the injury.<sup>107</sup> Because the *Feres* factors are no longer persuasive the policies underlying military tort immunity should be examined at a more fundamental level.

The threshold issue is whether a servicemember, injured through the tortious conduct of another acting within the scope of his or her duties, is entitled to relief. Certainly, few would assert that such injury should go totally uncompensated. Public policy obviously favors the compensation of injured servicemembers. In 1984 alone, the government expended \$28.8 billion on veterans' benefits, of which \$13.9 billion constituted compensatory benefits.<sup>108</sup> Thus, the issue is not whether the injured servicemember should be compensated, but rather a determination of the appropriate mechanism for adjudicating claims for compensation, and for equitably allocating the government's financial resources to ensure that as many deserving claimants are compensated as possible.

The framers of the Constitution delegated responsibility for the government and regulation of the military to Congress. Accordingly, it is the responsibility of the legislative branch, not the judiciary, to create the mechanism required to provide servicemembers with redress for their claims. The judiciary lacks the institutional competence to formulate and execute a comprehensive system of providing relief. As a practical matter, any judicial remedy would have to be developed on a case-by-case basis, without the advantage of the broad

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105. This rationale focused upon the notion that the FTCA was intended to waive governmental immunity only to the extent that the United States would be liable in tort if it were a private individual. The *Feres* court reasoned that since no parallel private liability existed for intramilitary torts, such claims were not within the scope of the FTCA. Later Court decisions abandoned this reasoning. See, e.g., *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *Indian Towing Co., Inc. v. United States*, 350 U.S. 61 (1955); see also Zillman, *supra* note 1, at 508.

106. See Bennett, *supra* note 1, at 400-01.

107. See *id.* at 401.

108. STATISTICAL ABSTRACT OF THE UNITED STATES 349 (1986 ed.).

overview accorded to Congress in enacting legislation. By contrast, Congress possesses broad powers which enable it to fully investigate causes of recurrent injury and create a well reasoned scheme of relief which provides equitable compensation to all injured servicemembers, whether or not their injury was tortiously inflicted. The broad-based approach of Congress also permits it to concurrently consider the ultimate objective of maintaining an effective military.

Perhaps the most important factor which must be weighed against the public policy favoring compensation of injured servicemembers is the maintenance of military discipline. The effectiveness of any military organization rests upon a degree of discipline unparalleled in civilian life.<sup>109</sup> The survival of the individual servicemember in battle, as well as the survival of his comrades, depends upon unquestioning response to command. General William Westmoreland observed:<sup>110</sup>

Inherent in the concept of military discipline and necessary for the accomplishment of the military mission is an accepted superior-subordinate relationship. In battlefield situations, a leader's plan of action cannot be debated. Time usually does not permit discussion. The commander must know that his orders will be carried out, for the soldier who shirks his task involves more than his own life. The lives of others are affected, and the success of the mission may well be jeopardized. Conduct which detracts from the respect toward and confidence in the superior weakens his authority and the loyalty he needs in performing his job.<sup>111</sup>

The discipline necessary to ensure efficient combat performance is not confined solely to the battlefield. It must be maintained at all times because of the unfortunate but constant possibility of war.<sup>112</sup>

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109. Professor Hirschhorn's analysis brings the necessity of discipline into sharp focus:

The most distinctively military activity, and the one that places the greatest strain on the serviceman, is ground combat. The combat infantryman faces the continuing prospect of death, maiming, or injury while tired, hungry, thirsty, and exposed to the worst extremes of climate. He is isolated from his normal sources of esteem, affection, and sexual gratification, and suffers constant, debilitating uncertainty about the intentions of the enemy and his own superiors. The situation bluntly confronts him with the fact that he is a mere means to his superiors' ends, of no intrinsic human worth to them, caught in circumstances beyond his control. He must overcome his own fear, and he must routinely commit acts that would be grossly immoral by his prior civilian standards. Modern firepower compels troops to disperse and take cover for protection, and the infantryman is often alone, unable to see what is happening around him and out of contact with his superiors. To perform effectively, the infantryman must display both endurance and initiative while frightened, exhausted, disgusted, and beyond the direct supervision of officers.

Hirschhorn, *supra* note 1, at 220-21 (footnotes omitted).

110. General Westmoreland is the former Chief of Staff of the United States Army.

111. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 6 (1971).

112. Professor Hirschhorn continues:

By the time that servicemen reach the combat situation, their experience with formal military discipline should have accustomed them to obedience by demonstrating that the Army does have the power to detect and punish overt resistance or non-compliance by individuals. One of the principal purposes of basic training, for example, is to show the trainees just how easily they can be

Discipline is a fundamental reality of military life, and the type and degree of discipline involved are alien to most civilians.<sup>113</sup> The special relationship of superior to subordinate is the cornerstone of military discipline and should remain free of interference by the civil judiciary. The nonjusticiability of intramilitary tort claims is founded upon this proposition.

The ultimate impact of judicial interference with this special relationship would be a matter of conjecture. However, the very thought of the possible ramifications of civil liability for battlefield decision-making might be enough to stifle bold initiatives. For instance, it could lead to watered-down training exercises designed to minimize the military's exposure to civil liability. Thus, a sensible approach must necessarily ensure adequate and timely relief for the injured servicemember while serving the policy considerations of civil tort law. The most effective remedy would serve these ends while leaving military discipline—and, consequently, military effectiveness—unencumbered by civilian interference. The responsibility for creating such a remedy is beyond the scope of the judiciary's constitutional and practical authority; the regulation<sup>114</sup> of intramilitary relationships is properly the sole province of Congress.

## VI. CONGRESSIONAL ACTIVITY

The nonjusticiability of intramilitary tort claims does not leave servicemembers without recourse, nor does it create, as one commentator has suggested, a class of remediless wrongs.<sup>115</sup> The responsibility for adequately compensating servicemembers injured incident to military service lies with Congress, and ultimately, the electorate. One fundamental justification for the political question doctrine is that sensitive policy decisions should be made by those members of the government who, unlike the judiciary, are subject to electoral accountability.<sup>116</sup>

Pursuant to its constitutional mandate, Congress has created remedies which provide members of the military with adequate relief for

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made to submit to the Army's authority. Moreover, pervasive authority does not merely condition the individual to compliance; it also causes the primary group to protect itself from organizational sanctions by turning against members who are conspicuous deviants.

Hirschhorn, *supra* note 1, at 224 (footnotes omitted).

113. See *supra* note 92 and accompanying text.

114. See *supra* note 69 and accompanying text.

115. Comment, *The Feres Doctrine*, *supra* note 1, at 929.

116. See *supra* note 94.

injuries sustained incident to service. Civil tort law is generally recognized as a mechanism by which losses may be adjusted and compensation afforded to an individual injured as the result of the conduct of another.<sup>117</sup> To this end, two policies are dominant in civil tort law: compensation<sup>118</sup> and deterrence.<sup>119</sup> Congress has enacted two independent statutory mechanisms which further these policies and provide a surrogate source of relief to servicemembers injured incident to military service: the Veterans' Benefits Act (VBA),<sup>120</sup> and the Uniform Code of Military Justice (UCMJ).<sup>121</sup> Each of these statutory schemes fulfills a separate function and a separate policy consideration, and will be considered in turn.

#### A. Compensation

In enacting the VBA, Congress has provided a "no fault" compensation system which provides veterans with both monetary compensation<sup>122</sup> and medical care.<sup>123</sup> Monetary compensation is paid on a monthly basis at a rate commensurate with the servicemember's degree of disability<sup>124</sup> without regard to fault. Claims brought under the VBA are adjudicated by the Veterans' Administration (VA)<sup>125</sup> on an *ex parte* basis.<sup>126</sup> A claimant may request a hearing,<sup>127</sup> present evidence or testimony,<sup>128</sup> and may request administrative review of any decision.<sup>129</sup> Although appellate review of VA decisions is extremely limited, it is available in certain narrow circumstances.<sup>130</sup> In *Stencel*, the Supreme Court characterized the VBA as a "dual purpose" com-

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117. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 1, at 6 (4th ed. 1971).

118. *Id.*

119. *Id.* § 4, at 23.

120. *See supra* note 97.

121. *See supra* note 96.

122. The Veterans' Benefits Act, 38 U.S.C.A. §§ 310, 314, 322, 334, 342 (West 1979), provides for fixed rates of recovery based upon the degree of injury suffered. *See Note, Intramilitary Tort Law, supra* note 1, at 998 n.28.

123. Under provisions of the VBA, any veteran may receive medical services for a service-connected disability, and a veteran who has a service-connected disability of 50% or more may receive medical services for any disability. 38 U.S.C.A. § 612 (West Supp. 1987).

124. *Id.* §§ 314, 334 (West 1976 & Supp. 1987).

125. 38 C.F.R. § 3.103(a) (1986).

126. *Id.*

127. 38 C.F.R. § 3.103(c) (1986).

128. *Id.* § 3.103(b).

129. *Id.* § 3.104(e).

130. Under 38 U.S.C.A. § 211(a) (West 1979), Veterans' Administration decisions are "final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision . . ." *Id.* In 1974, the Supreme Court narrowed the scope of this statute somewhat and established a right to limited judicial review in *Johnson v. Robison*, 415 U.S. 361 (1974). The Court observed that review is proper where "[t]he questions of law presented in [the] proceedings arise under the Constitution, not under the statute whose validity is challenged." *Id.* at 367 (quoting *Robison v. Johnson*, 352 F. Supp. 848, 853 (D. Mass. 1973)).

pensation scheme providing a "swift, efficient remedy for the injured serviceman" while placing an "upper limit of liability for the Government as to service-connected injuries."<sup>131</sup>

Although one would expect a statutory disability pension to fall short of the compensation a civil action might yield, close analysis and a direct comparison render a different conclusion.<sup>132</sup> For example, consider a hypothetical thirty-five-year-old sergeant in the Army, at pay grade E-7, with a dependent spouse. Assume this servicemember has been totally blinded in a service-related accident. The servicemember would recover \$1,856 per month<sup>133</sup> for life. Assuming that this individual is male, his life expectancy is 38.2 years.<sup>134</sup> Thus, he would recover approximately \$850,000<sup>135</sup> over his lifetime. In addition, the veteran would be entitled to \$82 per month for his spouse<sup>136</sup> during the serviceman's life, and \$616 per month<sup>137</sup> after his death. Assuming the spouse is also thirty-five years old, her

131. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977).

132. There are difficulties in comparing a VBA disability pension with a civil court judgment. The VBA pension resembles a lifetime annuity which must be discounted to present value in order to achieve a strict quantitative comparison with a civil judgment, which is typically paid in a lump sum. Professor Posner recommends that the appropriate discount rate is the prevailing interest rate on long term government bonds, since it closely approximates the return the recipient would realize if he were to invest a lump-sum disbursement in an annuity from an insurance company. See R. POSNER, *ECONOMIC ANALYSIS OF LAW*, § 6.13, at 148 (2nd ed. 1977). The prevailing interest rate for 30-year treasury bonds was approximately nine percent at the time of this writing. *Wall St. J.*, Dec. 29, 1987, at 20, col. 2.

A further difficulty exists with regard to civil judgment statistics—the verdict information does not disclose the actual breakdown as to what is being compensated (*i.e.* pain and suffering, lost future earnings, or future medical care). Some of the components of a damage award would be routinely discounted to present value if a detailed breakdown of the award's elements were available (*e.g.*, lost earnings and medical care). For a detailed discussion, see R. POSNER, *supra*, at § 6.13.

Additionally, the average damage verdict and the VBA pension would probably differ as to the duration of delay between the time of injury and the time of the award. As such, a further present value adjustment would be required to facilitate a strict quantitative comparison. The reader should accordingly bear the foregoing discussion in mind and view the comparisons set forth in subsequent footnotes and text. In order to avoid elaborate assumptions regarding the civil judgment statistics, textual analysis will be presented in unadjusted form and rounded to the nearest hundred-dollar increment.

133. 38 U.S.C.A. §§ 314(n), 334 (West 1976 & Supp. 1987).

134. Ordinary Life Annuity Table, 26 C.F.R. § 1.72-9 (1979) (Table I). This table is used to calculate income tax liability for lifetime annuities similar to a VBA disability pension.

135. Over his 38.2-year life-span, the serviceman would receive approximately 458 payments of \$1,856 each, totalling \$850,048.

136. 38 U.S.C.A. § 315(1)(A) (West Supp. 1987).

137. 38 U.S.C.A. § 411(a) (West Supp. 1987).



life expectancy is 40 years.<sup>138</sup> She, therefore, would likely recover \$51,100 in dependency compensation.<sup>139</sup> This hypothetical serviceman's aggregate recovery would total \$901,100,<sup>140</sup> and if he had dependent children, they would be eligible for additional benefits.<sup>141</sup> In addition to a disability pension, this serviceman would be entitled to free medical care for life, regardless of whether the need for such care is related to his service-connected disability.<sup>142</sup>

By contrast, a similarly situated civil litigant would recover an average verdict of \$2,095,395<sup>143</sup>—if his case went to the jury and the litigant prevailed. Of course, a sizeable portion of this lump-sum payment,<sup>144</sup> normally one-third, would likely be taken by the litigant's attorney as a contingency fee. This would leave the litigant with \$1,403,915<sup>145</sup> from which litigation expenses must be deducted. From the balance, the litigant must make provision for his own future medical expenses.<sup>146</sup> Assuming the litigant's case prevails, his financial recovery is more than that of the VBA pension recipient.

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138. See *supra* note 134.

139. Over the serviceman's 38.2-year life-span the spouse would receive approximately 458 payments of \$82 totalling \$37,556 and approximately 22 payments of \$616 each, totalling \$13,552 after his death, for a grand total of \$51,108 in dependency compensation.

140. Total compensation equals \$850,000 plus \$51,100.

141. See, e.g., 38 U.S.C.A. § 315 (West Supp. 1987) (providing for additional compensation for dependent children during the lifetime of the disabled veteran); *id.* § 413 (providing for direct compensation to children of a deceased veteran where there is no surviving spouse).

142. The VBA provides: "the Administrator may furnish such medical services as the Administrator determines are needed - A) to any veteran for a service-connected disability . . . and B) for any disability of a veteran who has a service-connected disability rated at 50 percent or more." 38 U.S.C.A. § 612(a) (West Supp. 1987).

143. According to statistics prepared by Jury Verdict Research Inc., expectancy values for total blindness are as follows:

Civil Recovery

Midpoint Verdict . . .	\$1,500,000
Probable Range . . . . .	\$500,000 to \$3,110,000
Verdict Range . . . . .	\$150,000 to \$7,500,000
Average Verdict . . .	\$2,095,395

1B PERSONAL INJURY VALUATION HANDBOOK, IV No. 313, at 2957 (Jury Verdict Research, Inc. 1986).

144. Although a lump-sum damages recovery appears to provide superior compensation to periodic payments, there are viable arguments to the contrary. One commentator has observed: "the function of damages being to restore the plaintiff's former position as far as practically possible, compensation for future losses should not anticipate the moment they occur; prospective earnings are accordingly compensable by corresponding periodic payments." Fleming, *Damages: Capital or Rent?*, 19 U. TORONTO L.J. 295, 299 (1969). This rationale provides a good theoretical basis for periodic payments (usually referred to as structured settlements in the civil arena). A rationale that is perhaps more realistic focuses on the likelihood that recipients of lump-sum awards may "spend their award[s] in a lump sum (sic) just as they received [them]." *Id.* at 300 (quoting A. CONARD, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 84 (1964)).

145. An attorney's contingency fee of 33.3% would equal approximately \$691,480.

146. According to Fleming:

However, the vast majority of cases settle prior to trial for *less* than might be realized if the case went before a jury,<sup>147</sup> and only if the litigant can establish the requisite indicia of liability of the defendant.

The servicemember who proceeds under the VBA, unlike the civil litigant, is freed from the burden of establishing liability. The relevant inquiries are limited to whether the servicemember was actually injured, the degree of the injury, and whether the injury was sustained during military service.<sup>148</sup> In the example above, the serviceman is guaranteed his recovery as long as his injury is service-related,

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Possible future changes in the victim's physical condition present an element of uncertainty most frequently encountered in assessing damages and least predictable alike in incident and extent. . . . The necessity, under a once-and-for-all system of damage awards, to predict the future in this regard imposes [a] serious handicap on the administration of justice . . . . The guess, however "informed," may be belied by the turn of events, to the tragic detriment of the victim who will to that extent go uncompensated.

Fleming, *supra* note 144, at 303. This passage underscores the importance of the VBA's provision for free future medical care.

147. Professor Marc Galanter has observed:

[M]ost civil cases in American courts are settled. That is, they terminate in an outcome agreed upon by the parties, sometimes formally ratified by the court, sometimes only noted as settled, and sometimes, from the court's viewpoint, abandoned. . . . Of those claims that become lawsuits, settlement is the prevalent mode of disposition. Of the cases in ten courts studied by the Civil Litigation Research Project, about 88% were settled; only 9% went to trial.

Galanter, *Reading The Landscape Of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27-28 (1983).

Commenting on a study of New York area courts of similar size and scope, Professor Marc Franklin of Columbia University Law School observed that "[r]ecovery is greater in suits that reach trial than in suits that are settled before trial." Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 18 (1961).

148. 38 U.S.C.A. §§ 314, 334 (West 1979 & Supp. 1987). In VA proceedings, a servicemember must "submit evidence sufficient to justify a belief in a fair and impartial mind that [his] claim is well-grounded." 38 C.F.R. § 3.102 (1986). VBA claimants must meet what is essentially a preponderance of the evidence standard, but if a "reasonable doubt arises" it is resolved in favor of the claimant. *Id.* One commentator has observed:

Although the same result might ultimately have been reached under Administrative and common law standards, the standard applied by the VA was intended to be far less stringent. This difference arguably reflects the differences in the agencies and the judiciary's broader policy aims. While tort law seeks to deter tortious conduct and compensate injured persons, the VA seeks primarily to assist veterans by compensating them for injuries incurred during military service. In a broader sense, the VA, as an administrative agency, also seeks to ensure fair and accurate decisionmaking, the expeditious and economical resolution of claims, and claimants' overall satisfaction with the administrative process.

Note, *A Critique of the Veterans Administration Claims Process*, 52 BROOKLYN L. REV. 533, 552 (1986).

regardless of who is at fault, unless he is found guilty of willful misconduct. In contrast, the civil litigant, in order to be assured of compensation, must ensure that liability is established on the part of some entity or individual who can afford to satisfy the judgment. Additionally, the serviceman, unlike the civil litigant, does not have the burden of paying attorney's fees; nor does the serviceman have to underwrite costly investigations and expert witness fees. Furthermore, although the VA is not a model of administrative efficiency, in all probability, a servicemember's claim will be processed in far less time than it would take for a similar claim to come before a civil court.

The civil recovery hypothetical set forth above is an optimistic forecast. In reality, a civil litigant would probably settle for much less, with all the delays and expenses incident to civil litigation.<sup>149</sup> Thus, the VBA remedy provided by Congress generally fulfills its objective of providing fair and adequate compensation to injured servicemembers, while concurrently avoiding direct interference with military discipline.<sup>150</sup>

Although the VBA works very well in the aggregate, both the Act itself, as well as those who administer it, are not infallible. The administrative difficulties attendant with the Act may be appreciated by considering the treatment under the VBA of two large classes of injured veterans: those exposed to atmospheric radiation during and immediately after World War II,<sup>151</sup> and those exposed to the toxic defoliant Agent Orange during the Vietnam conflict.<sup>152</sup> In order to qualify for disability pensions, veterans must establish that their injury was service-related by proving that a causal relationship existed between the injury and their military service.<sup>153</sup> Unfortunately, both classes of veterans in these cases were unable to establish a direct

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149. See *supra* note 147.

150. Under the provisions of the VBA, benefits are limited to honorably discharged veterans. 38 U.S.C.A. § 310 (West 1982). Hence, it is likely that a dishonorably discharged veteran could go wholly uncompensated. Perhaps a more equitable result could be attained by limiting dishonorably discharged veterans to *only* disability compensation and medical care for service-related injuries and disqualifying them from the remaining statutory veterans benefits.

151. See, e.g., *Gaspard v. United States*, 713 F.2d 1097 (5th Cir. 1983); *Jaffee v. United States*, 663 F.2d 1226 (3rd Cir. 1981), *cert. denied*, 456 U.S. 972 (1982); *Hampton v. United States*, 575 F. Supp. 1180 (W.D. Ark. 1983); see also Note, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 *HASTINGS L.J.* 933 (1981).

152. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 2d (1987); see also Comment, *When a Veteran "Wants" Uncle Sam: Theories of Recovery for Servicemembers Exposed to Hazardous Substances*, 31 *AM. U.L. REV.* 1095 (1982).

153. Under sections 310 and 331 of the Act, a veteran is entitled to compensation "[f]or disability resulting from personal injury suffered or disease contracted in line of duty . . . ." 38 U.S.C.A. §§ 310, 331 (West 1979). The two sections are substantially identical, and apply to wartime and peacetime, respectively.

causal relationship. They were only able to establish general causation based upon statistical inferences that the respective radiation or toxin caused their disabilities.<sup>154</sup> Having failed to establish an entitlement to a VBA pension, many of these veterans turned to the courts and were equally unsuccessful.<sup>155</sup> Congress, however, under pressure from a concerned electorate, recognized the predicament of these two classes of veterans and enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act<sup>156</sup> in October of 1984. Congress's action to supplement the VBA and to ensure fair and equitable treatment of these veterans was pursuant to its constitutional responsibility and consistent with the political question analysis above.

Some commentators have challenged the adequacy of VBA compensation in certain circumstances and see an urgent need for parallel and redundant civil adjudication and relief.<sup>157</sup> However, any future deficiencies in VBA recovery would be best addressed by legislative amendment of the statute, or judicial supervision of the VA's administration of the Act, rather than the creation of an independent civil cause of action. The primary benefit of the VBA's "no fault" approach is that it eliminates the need for direct civilian intervention in military affairs while providing the injured servicemember with fast, inexpensive, and equitable recovery.

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154. See Note, *supra* note 148, at 550 (analysis of causation difficulties encountered by veterans injured by Agent Orange); Note, *supra* note 151, at 957 (analysis of causation difficulties encountered by veterans injured by atomic weapon test).

155. See *supra* notes 1-10 and accompanying text.

156. 98 Stat. 542 (1984). Section 3 sets forth the purpose of the Act:

The purpose of this act is to ensure that Veteran's Administration disability compensation is provided to veterans who were exposed during service in the Armed Forces in the Republic of Vietnam to a herbicide containing dioxin or to ionizing radiation in connection with atmospheric nuclear tests, or in connection with the American occupation of Hiroshima or Nagasaki, Japan, for all disabilities arising after that service that are connected, based on sound scientific and medical evidence, to such service . . . .

*Id.* at § 3.

157. One commentator has asserted that the intramilitary remedial system of compensation and deterrence cannot withstand institutional military pressure. Note, *Intramilitary Tort Law*, *supra* note 1, at 999. Recognizing the need for a balance between the military's interest in maintaining discipline and civilian norms, however, he advocates federal court adjudication of intramilitary tort claims only in cases where culpability greater than simple negligence is alleged, and the plaintiff is not an active-duty servicemember. *Id.* at 1010. While the danger exists that deterrence may suffer from institutional pressure, it is hard to imagine how the military establishment could influence the adjudication of VBA claims.

## B. Deterrence

Perhaps the most appropriate avenue for fulfilling the deterrent function of civil tort law is article 138 of the Uniform Code of Military Justice, the military's grievance procedure.<sup>158</sup> Under this article, any servicemember who believes himself wronged by his commanding officer may complain to any superior commissioned officer who then forwards the complaint to an officer exercising general court martial jurisdiction over the officer who allegedly committed the wrongdoing.<sup>159</sup> A copy of the complaint and of any related proceedings is sent to the Secretary concerned.<sup>160</sup> Even critics of the existing remedies for intramilitary tort claims agree that article 138 is "competent to punish and deter isolated misconduct of lower level officers that sharply departs from the military's own norms of behavior."<sup>161</sup> However, widespread misconduct countenanced at the highest level of the military establishment is beyond the scope of the UCMJ.

In instances of widespread misconduct like human drug testing,<sup>162</sup> or radiation experimentation,<sup>163</sup> direct congressional review is clearly justified since responsibility for such large scale misconduct is vested in the executive branch and subject to both congressional and electoral review.<sup>164</sup> The most effective method of achieving deterrence in aggregate military behavior combines a congressional supervisory role over the military, and the internal disciplinary rules and sanctions of the UCMJ. Those who advocate a civil damages remedy to

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158. Article 138 is codified at 10 U.S.C.A. § 938 (West 1982). As an alternative, the command hierarchy may initiate an action for dereliction of duty under article 92 of the UCMJ, codified at 10 U.S.C.A. § 892(3) (West 1982). "A military member who knowingly fails to perform a duty, whether the duty be imposed by an administrative regulation, a custom of the service, or lawful order, may be prosecuted under Article 92(3) for dereliction of duty." *United States v. Heyward*, 22 M.J. 35, 36 (1986).

159. 10 U.S.C.A. § 938 (West 1982).

160. *Id.*

161. Note, *Intramilitary Tort Law*, *supra* note 1, at 1000.

162. See, e.g., *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

163. See, e.g., *Stanley v. United States*, 786 F.2d 1490 (11th Cir. 1986), *vacated in part, rev'd in part*, 107 S. Ct. 3054 (1987).

164. Although congressional authority to conduct investigations and compel testimony is not explicitly recognized in the Constitution, the Supreme Court has held the investigatory power to be "an essential and appropriate auxiliary to the legislative function." See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). Professor Tribe has observed:

Congress, of course, possesses the power to investigate and to compel testimony in connection with the exercise of its powers of self-regulation. But more significantly, Congress may also investigate any matter concerning which the Constitution authorizes it to legislate. "[T]he power of inquiry . . . is as penetrating and far reaching as the potential power to enact and appropriate [funds] under the Constitution."

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-19, at 376 (1988) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)); see also Landis, *Constitutional Limitations of the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926).

deter widespread military misconduct fail to recognize that such an award would primarily punish the taxpayer. Even if an individual commander were held personally liable, the burden of satisfying a large civil judgment would fall to the Treasury, and ultimately to the taxpayer. If the UCMJ is an adequate deterrent for individual tortious conduct,<sup>165</sup> and the servicemember is adequately compensated by the VBA,<sup>166</sup> then what further deterrence could a parallel and redundant civil cause of action provide? Such an action would have a generalized deterrent effect upon the aggregate institutional behavior responsible for broad-scoped military misconduct, but at what cost?

By enacting the UCMJ, Congress created a comprehensive framework for military discipline which not only serves to discourage wrongful conduct, but enhances military effectiveness. General Westmoreland observed:

Military law in contrast to civilian law . . . must have a motivating as well as a preventive function. In civilian life, if an employee disobeys the instructions of an employer or is absent from work, he may lose his job. On the other hand, the potential consequence of these types of conduct in the military are infinitely more serious to soldiers, to the military organization as a whole, and to the Nation. Such conduct must be deterred by criminal sanctions.<sup>167</sup>

The recognition of a civil remedy would inevitably conflict with the multifaceted role played by the UCMJ. In instances where the UCMJ is an insufficient deterrent, it is the constitutional responsibility of Congress to produce a mechanism to punish broad-scoped military misconduct in a manner which will preserve the discipline and effectiveness of the Armed Forces. It is not a responsibility which may be delegated to the civil judiciary.

## VII. CONCLUSION

Intramilitary tort immunity is not merely the result of a judicially created exception to the Federal Tort Claims Act. It is much more accurate to regard it as a function of the constitutionally mandated allocation of responsibilities among the three branches of the federal government. The Constitution grants to Congress plenary authority over the regulation of military affairs because of the special and unique requirements of military discipline. The Congress has acted, consistent with its authority, and created a comprehensive statutory scheme to discharge its constitutional responsibility. It has enacted

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165. See *supra* text accompanying note 161.

166. See *supra* notes 122-156 and accompanying text.

167. Westmoreland, *supra* note 111, at 6.

the Uniform Code of Military Justice, to regulate the internal discipline of the armed forces, and the Veterans' Benefit Act, to provide compensation and medical care to those injured incident to military service.

Given the textual commitment of military affairs to the legislative branch of the federal government, Congress's substantial activity in the field, and in light of the judiciary's lack of expertise in military affairs, intramilitary tort claims are properly situated beyond the jurisdiction of the civil courts. If the statutory remedies prove inadequate, then it is Congress's responsibility, under the pressure of periodic review by the electorate, to improve the administrative remedies already in place and insure the disciplinary accountability of military personnel.

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\* The author wishes to express his sincere appreciation to Professor Gregory L. Ogden of Pepperdine University School of Law for his support and encouragement in the preparation of this article, and to Heidi Fillo for her unfailing patience and inspiration.